Commentary to Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability

Nicole Roth[1]

I'd like to start by thanking our attendees for being here today. Especially, thank you to Professor Anderson, for your time today and for sharing your thoughts on compliance policies—particularly with the development of "shadow trading" as a potential theory of insider trading liability. It's a pleasure to have you here and speaking with us today, and I wanted to express how much I enjoyed reading some of your previous works on compliance and insider trading.[2] So, I'm honored to be here as a commentator today. I'm a second-year law student here at The University of Tennessee College of Law. This means I'm just getting into business law related classes and have started learning about fiduciary duties in my coursework thus far, specifically in the realms of business associations and professional responsibility. Though, I haven't yet had the opportunity to take any specialized coursework related to securities. So, I greatly appreciated reading about and seeing your presentation discussing fiduciary duties in the insider trading context.

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[1] Nicole Roth is a second-year law student at The University of Tennessee College of Law and is scheduled to graduate in May 2024. The author was asked to provide a comment to the panel of Professor John Anderson and his discussion titled: Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability.

[2] *See, e.g.*, John P. Anderson, *Solving the Paradox of Insider Trading Compliance*, 88 TEMPLE L. REV. 273 (2016).

Today though, I'd like to focus on the drafting of corporate compliance policies, particularly what Professor Anderson is suggesting here with ensuring insider trading policies "include narrow trading restrictions."[3] Rather than drafting overly broad trading restrictions.[4] From reading some of Professor Anderson's previous works, I realize there is a still a strong incentive to draft more inclusive compliance policies.[5] Specifically, I learned how the Insider Trading and Securities Fraud Enforcement Act of 1988 ("ITSFEA")[6], as mentioned during today's discussion, "extended the civil penalty of treble damages to all 'controlling persons.'"[7] Thus, because under ITSFEA issuers "may incur derivative liability if they 'knew or recklessly disregarded the fact that [a] controlled person was likely to engage in the act or acts constituting the violation and failed to take appropriate steps to prevent such act or acts before they occurred'"[8] there are strong financial incentives for

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[3] John P. Anderson, *Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability*, TRANSACTIONS: TENN. J. BUS. L. (forthcoming 2023).
[4] *Id.* (describing policies that "include trading in the securities of another publicly traded company while in possession of the firm's material nonpublic information").
[5] *See* Anderson, *Solving the Paradox of Insider Trading Compliance*, *supra* note 2, at 276.
[6] Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (codified in scattered sections of 15 U.S.C. § 78 (2012)).
[7] John P. Anderson, *Solving the Paradox of Insider Trading Compliance for Issuers*, COLUM. L. SCH.: CLS BLUE SKY BLOG (Apr. 15, 2016) https://clsbluesky.law.columbia.edu/2016/04/15/solving-the-paradox-of-insider-trading-compliance-for-issuers/ (citing Securities Exchange Act § 21A(a)(3), 15 U.S.C. § 78U-1). *See* Anderson, *Solving the Paradox of Insider Trading Compliance*, *supra* note 2, at 276 (expanding beyond the individuals actually engaging in the insider trades).
[8] Anderson, *Solving the Paradox of Insider Trading Compliance*, *supra* note 2, at 276–77 (quoting 15 U.S.C. § 78u-1(b)(1)(A)).

companies to institute effective corporate compliance policies and ethics programs. [9] Rather than running the risk of failing to take appropriate steps—subjecting the company to derivative liability—it seems logical to draft more sweeping policies. Further, implementation and adoption of corporate compliance policies is a factor the Justice Department considers in deciding whether to prosecute companies.[10] So I thought these were interesting incentives that companies are facing, which may cause them to institute these more broadly applicable policies like Professor Kuney was discussing.[11] Additionally, while previously discussing today's symposium, Professor Hemingway mentioned to me that the federal sentencing guidelines create incentives to adopt effective compliance and ethics program. Specifically, how by adopting insider trading compliance policies and procedures, issuers can reduce their culpability score.[12]

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[9] *See id.* at 277.
[10] *See id.* at 277 n. 21 (first quoting Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components, U.S. Att'ys 8 (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf; then citing Press Release, U.S. Dep't of Justice, U.S. Deputy Attorney General Paul J. McNulty Revises Charging Guidelines for Prosecuting Corporate Fraud (Dec. 12, 2006), http://www.justice.gov/archive/opa/pr/2006/December/06_odag_828.html).
[11] *See* George W. Kuney, Commentary, *Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability*, TRANSACTIONS: TENN. J. BUS. L. (forthcoming 2023).
[12] *See* Anderson, *Solving the Paradox of Insider Trading Compliance for Issuers*, *supra* note 7 (citing U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5(f)(2014)).

On the one hand, there are there are strong incentives to adopt compliance policies that address all potential risks.[13] On the other hand the new "shadow trading" theory of insider trading liability may indicate that broad insider trading policies may be exposing companies and their employees to additional liability.[14] Thus, I can see how a more narrowly tailored policy might be an approach that a company may want to take.[15] However, I also found valuable Professor Kuney's point that we may want still go beyond what is just the minimum of the law[16]—especially ,as I have begun to understand the a small amount of the ambiguity involved in insider trading issues.[17]

From a student perspective, both Professor Anderson and Professor Kuney have given me a lot consider in regard to how I begin to understand insider trading compliance policies, but also just general drafting concerns as I begin to craft my own drafting style in coursework and throughout my career. Thank you so much Professors for your

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[13] *See supra* notes 5–12 and accompanying text.
[14] *See* Anderson, *Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability*, *supra* note 3 (suggesting that if the Medivation policy wording stating that "'For anyone to use such information to gain personal benefit is illegal'—is true under the misappropriation theory, then it is only because Medivation chose to make it so by including the broad language in the policy")
[15] Anderson, *Rethinking Insider Trading Compliance Policies in Light of the SEC's New "Shadow Trading" Theory of Insider Trading Liability*, *supra* note 3 (suggesting retaining valuable employees may be a reason to more narrowly tailor the language).
[16] Kuney, *supra* note 11.
[17] *See, e.g.*, Joan MacLeod Heminway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 AM. U. L. REV. 1131 (2003).

comments. Thank you to all our attendees for your time today. Further, thank you to the *Transactions* Journal for the chance to speak briefly with you all today, it's truly been a wonderful opportunity to be a part of today's symposium.